

STATE OF VERMONT  
PROFESSIONAL RESPONSIBILITY BOARD

In re: PRB File No. 2014.133

Decision No. 179

The parties have filed a Stipulation of Facts together with Recommended Conclusions of Law and a Recommendation for Sanctions. Respondent has waived certain procedural rights including the right to an evidentiary hearing. The panel accepts the stipulated facts and recommended conclusions of law in part and orders that Respondent be admonished by Disciplinary Counsel for violation of Rules 1.15(a)(1), 1.15A(a)(1) and 1.15A(a)(2) of the Vermont Rules of Professional Conduct for failure to maintain complete trust account records and for placing estate funds in his trust account rather than a fiduciary account. In addition Respondent is placed on probation under the terms set forth below.

The charge of violation of Rule 1.15(b), for holding approximately \$150.00 of his own money in his trust account is dismissed.

**Facts**

Respondent is licensed to practice in Vermont and was admitted in 2006. In November of 2013, Respondent's trust account was selected to be audited as part of Disciplinary Counsel's audit program. A Certified Public Accountant (CPA) performed the audit for compliance with Rules 1.15 through 1.15B of the Vermont Rules of Professional Conduct for the period April 30, 2011, through October 31, 2013, and provided a written report to Disciplinary Counsel. As a result of the audit, Disciplinary

Counsel opened an investigation into Respondent's trust account management.

The CPA found the following material non-compliance with the rules during this period.

1. Respondent did not maintain complete records of trust account funds.
2. Respondent left \$151.57 of his own money in the trust account. This money represented collected fees owed to Respondent which he chose not to disburse to himself in order to have funds available in the account to pay bank service charges.
3. Respondent deposited funds related to an estate into his IOLTA account rather than a separate fiduciary account.
4. Respondent did not maintain a record for each client or person for whom property was held showing all receipts and disbursements and running account balances.
5. Respondent did not reconcile his trust account to his monthly bank statement.

The CPA also found that Respondent did not provide notice to his clients when receiving funds in which the client had an interest. It was, however, determined after investigation that while there was no written notice, Respondent was in contact with the clients on a regular basis and they were aware that the funds had been deposited in Respondent's trust account.

Respondent does not routinely handle estate matters, but was asked to assist a local non-profit which received two separate insurance payouts. When Respondent received the funds he checked the Rules of Professional Conduct and mistakenly believed that he should place the funds in his trust account which he did.

Respondent has advised Disciplinary Counsel that he has instituted new policies

to ensure compliance with the trust account rules in the future.

1. He is installing new accounting software which will allow him to keep his trust account records in a central location and better organized. He will be able to easily identify funds by client and matter number.
2. He has sought the assistance of an experienced attorney to review his trust account procedures and to provide assistance and guidance.
3. He is taking greater advantage of digital services offered through his bank.
4. He has met with Disciplinary Counsel to further his understanding of the requirement of the Rules of Professional Conduct.

Respondent's client funds were never improperly used or in jeopardy and there is no evidence that any client or third party was injured as a result of the violations.

There are a number of mitigating factors present. Respondent has no prior disciplinary record; he had no dishonest or selfish motive; he has made a timely and good faith effort to rectify the consequences of his misconduct; has cooperated with the disciplinary proceedings and suffers from a physical disability. In late 2011, Respondent was diagnosed with a serious and chronic illness.

### **Conclusions of Law**

Rule 1.15(a)(1) of the Rules of Professional Conduct provides that:

A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property. Funds shall be kept in accordance with Rules 1.15A and B. Other property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of six years after termination of the representation.

Rule 1.15A(a) of the Rules of Professional Conduct provides that:

Every lawyer or law firm holding funds of clients or third persons in connection

with a representation as defined in Rule 1.15(a)(2) shall hold such funds in one or more accounts in a financial institution. An account in which funds are held that are in the lawyer's possession as a result of a representation in a lawyer-client relationship shall be clearly identified as a "trust" account. An account in which funds are held that are in the lawyer's possession as a result of a fiduciary relationship that arises in the course of a lawyer-client relationship or as a result of a court appointment shall be clearly identified as a "fiduciary" account. The lawyer shall take all steps necessary to inform the financial institution of the purpose and identity of all accounts maintained as required in this rule. The lawyer or law firm shall maintain an accounting system for all such accounts that shall include, at a minimum, the following features:

- (1) a system showing all receipts and disbursements from the account or accounts with appropriate entries identifying the source of the receipts and the nature of the disbursements;
- (2) a record for each client or person for whom property is held, which shall show all receipts and disbursements and carry a running account balance;
- (3) records documenting timely notice to each client or person of all receipts and disbursements from the account or accounts; and
- (4) single source for identification of all accounts maintained as required in this rule.

We find a violation of these two rules. Respondent failed to maintain complete records of his trust accounts. He did not maintain a record for each client for whom he was holding property showing all receipts and disbursements and a running account balance. He failed to regularly reconcile his trust account to bank and client balances. He deposited money belonging to an estate in his trust account rather than establishing a separate fiduciary account as required by the rule. Respondent mistakenly thought that placing the funds in his trust account was the proper thing to do, but Respondent's misinterpretation of the rules is not an excuse for non-compliance.

Rule 1.15(b) of the Rules of Professional Conduct provides that:

A lawyer may deposit the lawyer's own funds in an account in which client funds are held for the sole purpose of paying service charges or fees on that account, but only in an amount necessary for that purpose.



At the time of the audit, Respondent held \$157.57 of his own money in his trust account left there specifically for the purpose of paying bank service fees. Disciplinary Counsel has established an internal rule of thumb as to how much of his or her own money it is appropriate for an attorney to hold in a trust account for purposes of paying bank fees, and believes that any amount in excess of \$50.00 will violate this rule. While we do not dispute the fact that this may be an appropriate benchmark figure, it is not set forth in the rules and we do not believe that this is widely known by the bar. A recent hearing panel decision found that the deposit of \$1000.00 for purposes of paying bank fees was excessive. *In re PRB Decision No.163* (2013). We would agree that this is an excessive amount, but without generally circulated notice to the bar of the \$50.00 limit we are not prepared to find that the sum of \$157.57 violates this rule and this charge is dismissed.

### **Sanctions**

The parties have joined to recommend that Respondent be admonished by Disciplinary Counsel and placed on probation for a one year period. It is consistent with both the ABA Standards for Imposing Lawyer Sanctions and prior Vermont cases and we adopt the recommendation.

Section 4.14 of the ABA Standards provides that admonition “is appropriate when a lawyer is negligent in dealing with client property and causes little or no actual or potential injury to a client.”

Respondent was negligent in his failure to follow the trust accounting rules. There was no actual injury to a client and little potential for injury. No client or third party was injured as a result of the violations.

In addition there are a number of mitigating factors. Respondent has no prior disciplinary record, *ABA Standards §9.32(a)*; he had no dishonest or selfish motive, *ABA Standards §9.32(b)*; he has made a timely and good faith effort to rectify the consequences of his misconduct by improving his record keeping, *ABA Standards §9.32(d)*; he has cooperated with the disciplinary proceedings, *ABA Standards §9.32(e)* and suffers from a physical disability, *ABA Standards §9.32(h)*. There are no aggravating factors.

There have been a number of recent trust account cases resulting in admonition which are similar to the present case. In these cases, the attorney's failure to follow the rules is typically brought to Disciplinary Counsel's attention by trust account audits, attorney's responses to the annual trust account survey and by overdraft notices sent to Disciplinary Counsel when attorneys have failed to confirm the receipt of funds in real estate transfer cases.

In all of these cases, the attorney's mental state has been one of negligence, there has been little or no harm and an immediate and good faith effort to remedy the violation of the rules. Disciplinary Counsel has routinely recommended admonition, and hearing panels have so ordered.

Both *In re PRB Decision No. 163* (2013) and *In re PRB Decision No. 167* (2014), arose out of trust account audits by Disciplinary Counsel. These cases are very similar to the present case. The attorneys were negligent in failing to follow the rules, no clients were harmed and both had a misunderstanding of the law.

*In re PRB Decision No. 147* (2012) and *In re PRB Decision No. 171* (2014), arose out of the attorneys' failure to insure that funds needed for a real estate transaction had

been deposited in the trust account used for the payouts on the transaction. These were isolated instances with no injury to clients and quick action on the part of the attorney to rectify the deposit errors.

One of the goals of the lawyer discipline system is “to protect the public from harm and to maintain confidence in our legal institutions by deterring future misconduct.” 167 Vt. 219, 226 (1997). The parties have recommended that we impose probation in this matter in order to insure that Respondent’s trust accounting system is in compliance with the trust account rules in the future. We agree that this is an appropriate way to protect the public and impose probation for a period of one year.

### **Order**

Respondent shall be admonished by Disciplinary Counsel for violation of Rules 1.15(a)(1) and 1.15A(a) of the Vermont Rules of Professional Conduct and placed on probation pursuant to Administrative Order 9 Rule 8 (A)(6).

The charge of violation of Rule 1.15(b) is dismissed.

### **Probation**

1. The term of probation shall be for a period of twelve months, commencing on the date upon which the decision in this matter becomes final.
2. A experienced attorney shall oversee Respondent’s trust account and related record keeping during the course of his probation (the probation monitor).  
Respondent’s choice of probation monitor shall be approved by Disciplinary Counsel.
3. Respondent shall take appropriate steps to address client confidentiality.
4. During the term of probation, Respondent shall meet with his monitor at least

- once every four weeks to discuss issues related the his trust account. At each meeting, Respondent shall review his trust account records with the monitor.
5. If the monitor has any concerns about Respondent's trust account or record keeping, he or she shall share those concerns with the Office of Disciplinary Counsel in a timely manner.
  6. The monitor shall make any suggestions to Respondent that he or she thinks are warranted or advisable, and Respondent shall give due consideration to any such suggestions.
  7. If Respondent misses a scheduled meeting without notifying his monitor in advance, or if Respondent goes more than eight weeks without meeting his monitor, the monitor shall report this fact to Disciplinary Counsel. Failure to meet with his monitor on a regular basis shall constitute a violation of probation.
  8. Respondent shall permit and authorize his monitor to respond to Disciplinary Counsel's request for information relating to Respondent's compliance with his probation.
  9. Respondent shall secure from his monitor a brief report summarizing each meeting, including any recommendation made by the monitor, and Respondent shall file a copy with Disciplinary Counsel within thirty days of each meeting. (It is acceptable for the monitor to send, or email his or her report directly to Disciplinary Counsel). The report may be in the form of a letter to Disciplinary Counsel outlining the date of the meeting, the topics covered, and the monitor's judgment as to whether Respondent is handling his trust account in a manner consistent with the Rules of Professional Conduct.

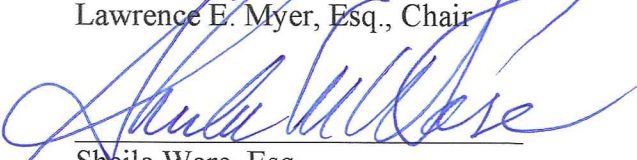


10. Respondent shall bear any costs related to his compliance with the terms of his probation. In particular if the monitor charges for his or her time, Respondent shall be responsible for the cost of that time.
11. In the event that the monitor is unable to continue to serve, Respondent shall immediately notify Disciplinary Counsel and, as soon as possible, find a replacement. Respondent's choice of a replacement must be approved by Disciplinary Counsel. If Respondent is not able to secure a new monitor within eight weeks of the departure of his monitor, Respondent shall be considered in violation of his probation.
12. Respondent's probation shall be renewed or terminated after twelve months as provided in A.O.9, Rule 8(A)(6).

Dated: October 8, 2014

Hearing Panel No. 3

  
Lawrence E. Myer, Esq., Chair

  
Sheila Ware, Esq.

  
Mitchell Jay

